BEFORE THE FULL BENCH, ODISHA SALES TAX TRIBUNAL: CUTTACK
S.A.No.42(ET) of 2016-17

(Arising out of the order of the learned Addl.CST(Appeal), Central Zone, Odisha, Cuttack Appeal Case No. AA-CUI/232/2012-13, disposed of on 05.10.2015)

Present: **Shri G.C. Behera, Chairman**
Shri S.K. Rout, 2nd Judicial Member &
Shri B. Bhoi, Accounts Member-I

M/s. Proctor & Gamble Home Products Pvt. Ltd., Plot No.808-809, Pahal, Cuttack Bhubaneswar Road. ... Appellant.

-Versus –

State of Odisha, represented by the Commissioner of Sales Tax, Odisha, Cuttack. ... Respondent.

For the Appellant: : Mr. R.K. Kar, Advocate.
For the Respondent : Mr. D. Behura, S.C. (CT).

Date of Hearing : **20.12.2023** *** Date of Order : **18.01.2024**

O R D E R

The dealer-assessee is in appeal against the order dated 05.10.2015 of the Additional Commissioner of Sales Tax (Appeal), Central Zone, Odisha, Cuttack (in short, 'ld. FAA') passed in Appeal Case No. AA-CUI/232/2012-13 allowing the appeal in part and reducing demand to ₹68,54,545.00 assessed

under Section 9 C of the Orissa Entry Tax Act, 1999 (in short, 'OET Act') passed by the Deputy Commissioner of Sales Tax, Cuttack-I Central Circle, Cuttack (in short, 'ld. STO').

2. The summary of the case is that the dealer-assessee in the present case under the name and style of M/s. Proctor & Gamble Home Products Pvt. Ltd., Plot No 808/809, Pahal, Cuttack-Bhubaneswar Road carries on business in Laundry Products like Tide, Ariel, Tide Bar, Shampoo, Pampers, Kolestint and Olay Cream on wholesale basis. The dealer-assessee was assessed to tax and penalty of ₹71,06,648.00 under Section 9-C of the OET Act for the tax period from 01.04.2009 to 31.03.2011 basing on the Audit Visit Report (AVR). The first appeal as preferred by the dealer-assessee resulted in reduction of demand of tax to the tune of ₹68,54,545.00 including penalty under Section 9-C (5) of the OET Act. The dealer-assessee became further aggrieved with the order of the ld. FAA and filed second appeal at this forum.

3. In filing grounds of appeal, the dealer-assessee through its ld. Advocate Mr. Rajat Kumar Kar contends that levy of penalty under Section 9-C (5) of the OET Act is not justified for the reasons being that entry tax to the tune of ₹90,74,841.00 has been paid as against tax due of ₹89,48,789.00 before completion of the assessment dated 16.03.2012. There being no tax due at

the time of assessment, imposition of penalty for ₹68,54,545.00 is arbitrary and without authority of law. Mr. R.K. Kar, ld. Advocate who appeared on behalf of the dealer-appellant placed reliance on the decision of this Forum passed on 18.06.2022 in S.A. No.199(ET) of 2014-15 in case of ***M/s. Maheswari Brothers Co. Limited Vrs. State of Odisha***. Mr. Kar has also relied on the decision of this forum passed in S.A. No.18(ET) of 2011-12 in case of the ***State of Odisha Vrs. M/s. Taurian Iron and Steel Co. (P) Ltd.*** wherein it is observed that proviso to Section 33(5) being a substantive provision of law under the OVAT Act, 2004, it cannot be applied *mutatis mutandis* under the OET Act. Since there is no specific provision in the OET Act as provided under the proviso to section 33(5) of the OVAT Act, the penalty imposed without giving credit of payment of tax before completion of assessment is unsustainable.

The State has submitted the cross objection supporting the order of the ld.FAA.

4 The orders of the forums below are gone through. The grounds of appeal together with the materials available on record are perused. On perusal, it transpires that scheduled goods to the tune of ₹89,48,78,945.64 were in receipt from outside the local area by the dealer-assessee during the tax period

01.04.2009 to 31.03.2011 wherein entry tax @1% was leviable. The tax due has therefore arrived at ₹89,48,789.45. The dealer-assessee is found to have paid entry tax amounting to ₹54,58,491.00 at the time of filing returns and ₹36,16,350.00 on dated 13.07.2011 after receipt of tax audit notice. The ld.FAA observed that the provision of Section 33(5) of the OVAT Act is applicable *mutatis mutandis* to the provision of the OET Act as mandated under Rule 34 of the OET Rules holding that "*For any other matters not specified under these rules but required for the carrying out the purposes of the Act and these rules, the provision under VAT Act and the rules made thereunder shall* mutatis mutandis *apply"*. The ld.FAA observed that the proviso to Section 33(5) of the OVAT Act provides that *"no such voluntary disclosure shall be accepted where the disclosure is made or intended to be made after receipt of the notice for tax audit under this Act."* Under these premises, the ld.FAA concluded that voluntary payment of admitted entry tax on 13.07.2011 after service of the notice of tax audit and tax audit visit on 08.07.2011 is not accepted. Accordingly, ld.FAA allowed adjustment of entry tax paid to the tune of ₹54,58,491.00 from the amount of tax due determined at ₹89,48,789.45 and thus, the amount of entry tax found liable for payment stood at ₹34,90,298.45. Penalty as provided under

Section 9-C (5) of the OET Act for an amount equal to twice the amount of tax as assessed for ₹34,90,298.45 was imposed culminating to ₹69,80,596.90. Imposition of penalty being mandatory as per the statute, the ld.FAA adjudicated imposing penalty. Accordingly, entry tax and penalty put together worked out to ₹104,70,895.00 against which, the dealer-assessee having paid ₹36,16,350.00 on 13.07.2011,an amount of ₹68,54,545.00 was payable as determined by the ld.FAA.

In this connection, we find it relevant to refer to the decisions of this Tribunal delivered in S.A. No.199(ET) of 2014-15 in case of *M/s. Maheswari Brothers Co. Limited Vrs. State of Odisha*, S.A. No.18(ET) of 2011-12 in case of the *State of Odisha Vrs. M/s. Taurian Iron and Steel Co. (P) Ltd* and S.A. No.101 (ET) of 2015-16 in case of **State of Odisha vs. M/s Bajrangbali Wire Products Pvt. Ltd**. This forum in S.A. No.101 (ET) of 2015-16 provides as under:-

> *"7. Section 33 of the OVAT Act corresponds to Section 7 of the OET Act. Similarly sub-section (5) of Section 33, which deals with furnishing of revised return in case of omission, error etc. corresponds to Section 7(2) of the OET Act. Provision similar to the proviso to Sub-Section (5) of Section 33 of the OVAT Act is absent in Section 7(2) of the*

OET Act. Therefore, the Legislature must be deemed to have omitted the provision deliberately in the OET Act. In any case, the omission cannot be sought to be made good by taking recourse to Rule 34 of the OET Rules. The position which emerges thus is, the dealer is precluded from making a voluntary disclosure regarding higher amount of tax due after receipt of notice for tax audit under the OVAT Act, but there is no such bar under the OET Act. I am, therefore, unable to accept the contention advanced by Sri Raman in this regard."

5. In view of the above dictum, it is inferred that since there is no specific provision in the OET Act as provided under proviso to Section 33(5) of the OVAT Act, imposition of penalty under Section 9 C (5) of the OET Act against admitted tax paid before assessment framed under Section 9 C of the OET Act is not justified. Accordingly, the forums fellow are not justified in not taking into account the admitted tax paid by the dealer-assessee prior to assessment, assessed the tax liability and imposed penalty thereon. It is noted that Section 9 C (5) of the OET Act provides for imposition of penalty in respect of any assessment completed under sub-section (3) or (4) of Section 9 C. The penalty that the forums below imposed in the instant case is

on admitted tax deposited by the dealer-assessee. It is not justified. Accordingly, the contention taken by Mr. Kar, ld. Advocate for the dealer-assessee deserves consideration. Hence, it is ordered as under

6. Resultantly, the second appeal filed by the dealer-assessee is allowed. The order of the ld.FAA is set aside. The impugned case is remitted back to the ld. assessing authority to re-compute the tax liability of the dealer-assessee in the light of the above observation within three months from the date of receipt of this order and allow refund, if admissible as per the provision of law. Cross objection is accordingly disposed of.

Dictated & Corrected by me

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

Sd/-
(Bibekananda Bhoi)
Accounts Member-I

I agree,

Sd/-
(G.C. Behera)
Chairman

I agree,

Sd/-
(S.K. Rout)
2nd Judicial Member